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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 701

SMITH & WESSON, INC. (a Corporation), *Petitioner*

v.

HAROLD L. COSPER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of California entered in the above entitled cause November 20, 1959, which said judgment and decision reversed the judgment of the Superior Court of the State of California in and for the County of Kern dated January 24, 1958 quashing service of summons on petitioner.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported in 53 Cal. 2nd at page —, 53 Advanced Cal. Reports No. 2, 77; the opinion of the District Court of Appeal, Fourth Appellate District, State of California, is reported at 338 P. 2d 596, 170 A.C.A. 244; the opinion of the Superior Court of Kern County, California, is unreported. All of the said opinions are included in the Appendix.

JURISDICTION

The opinion of the Supreme Court of the State of California was filed and entered on November 20, 1959, by which said Court reversed the ruling of the Superior Court of Kern County, California, quashing the service of process upon the petitioner. The Superior Court of the State of California in and for the County of Kern has by its order dated January 30, 1960 granted to this petitioner an extension of time within which to appear or plead to and including March 13, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Is the decision of the Supreme Court of the State of California in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it subjects a foreign corporation to jurisdiction *in personam* on an action arising out of tort without the necessary minimum contacts of said corporation to the State, as not to violate traditional notions of fair play and substantial justice?

2. Is the decision of the Supreme Court of the State of California in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States in its interpretation of the State of California Corporations Code Section 6500 in that it interprets "general manager within the state" to encompass service upon an employee of an independent contractor with the foreign corporation who is in fact not an agent, servant, employee, or manager, or in any wise connected with the said corporation on the sole ground that said individual's past conduct would make it likely that the foreign corporation would receive notice of such service?

3. Is a foreign corporation doing business in the State of California sufficient to make it amenable to *in personam* jurisdiction of the State of California courts where its entire activity in the State of California consists of distribution of products manufactured in Massachusetts, F.O.B. Massachusetts, pursuant to orders originating in the State of California and sales promotions on a non-exclusive basis by independent contractors called manufacturer's representatives acting without control by Smith & Wesson, Inc., on a straight commission of 5%, said corporation having no agents, employees, servants, properties, accounts of any kind in the State of California and where the manufacturer's representative buys its own samples and receives no help or assistance, direction or control by Smith & Wesson, Inc., except the furnishing of advertising brochures available to the jobbing trade throughout the world? and

4. Does the delivery of summons to an employee of an independent contractor constitute valid service upon a foreign corporation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment XIV:

"* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

2. State of California Corporation Code, Sec. 6500:

Section 6500 of the Corporations Code of the State of California reads as follows:

"*Service upon designated agent or officer; certified copy of designation as evidence.* Delivery by hand of a copy of any process against a foreign corporation (a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or if the corporation be a bank to a cashier or an assistant cashier (b) to any natural person designated by it as agent for the service of process, or (c), if the corporation has designated a corporate agent, at the office of such corporate agent in the city, town, or village named in the statement filed by the corporation pursuant to Section 6403 to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5, if such certificate has not been superseded or otherwise to any person at such office named in the last certificate filed pursuant to Section 3301.6 or 6403.6, shall constitute valid service on the corporation.

"A copy of the designation, certified by the Secretary of State is sufficient evidence of the appointment of an agent for the service of process."

STATEMENT OF CASE

The matter arises out of a complaint filed in the Superior Court of the State of California in and for the County of Kern against Smith & Wesson Arms Co.,

a corporation (proper name Smith & Wesson, Inc.) and E. Morton Pitt. There are two causes of action, one on warranty against E. Morton Pitt which is not involved in this petition, and one alleging negligent manufacture by Smith & Wesson Arms Co. (proper name Smith & Wesson, Inc.) of a pistol and the explosion thereof on the 4th day of January, 1956, in the City of Delano, County of Kern, State of California, with injury to plaintiff. (Cl. Trs., page 2). Summons was handed to an individual named Walter K. Lookabaugh in an effort to serve Smith & Wesson Arms Co. (Smith & Wesson, Inc.) as alleged sales manager of Smith & Wesson Arms Co. for eleven western States, manufacturer's representative for Smith & Wesson Arms Co., and general manager of Smith & Wesson Arms Co. (Cl. Trs., pages 67 and 68). On June 21, 1957, special appearance by way of Motion To Quash Service was filed by Smith & Wesson, Inc., a Massachusetts corporation, supported by the affidavit of Carl R. Hellstrom, president of Smith & Wesson, Inc. (Cl. Trs., pages 15 through 18). The Motion to Quash was on two grounds:

1. That Smith & Wesson, Inc., was a foreign corporation not doing business within the State of California and immune to service of process, and

2. That there was no service under California Corporations Code, Section 6500, and that the service on Walter K. Lookabaugh was ineffective for any purpose. (Cl. Trs., pages 15 through 18).

Certain affidavits were submitted by plaintiff and depositions submitted as affidavits after being quashed as depositions due to irregularity in their being obtained which, however, established nothing more

than descriptions of the activities of Smith & Wesson, Inc., as outlined in the Affidavit of Carl R. Hellstrom. (Decision of Supreme Court of the State of California, Appendix, page 1a *et seq.*, at page 4a).

The affidavit of Carl R. Hellstrom is set forth at length as upon it the court predicates one of its important findings:

> "I, Carl R. Hellstrom, President of Smith & Wesson, Inc., on oath depose and say:
>
> "That Smith & Wesson, Inc. is a Massachusetts Corporation with its offices and manufacturing facilities in Springfield, Massachusetts.
>
> "That Smith & Wesson, Inc. is not qualified to do business in California, and has not filed an application to do business in California, and has not requested the Secretary of State, or other lawful authority, to do business in California.
>
> "That Smith & Wesson, Inc. has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against Smith & Wesson, Inc. in California.
>
> "That Smith & Wesson, Inc. has never had, nor does it now have offices in California, nor has it held any sales conventions in California.
>
> "That Smith & Wesson, Inc. has no property, inventory or assets in California.
>
> "That Smith & Wesson, Inc. does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an over-riding discount, or commission, on business initiated by them.

"That the Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field.

"That Smith & Wesson, Inc. has never had, nor does it now have, any contract or agreement with them except that they were, in common with their other lines, to promote on a non-exclusive bases the sale of our products on the West coast against a straight commission of 5%.

"That Smith & Wesson, Inc. does not now have, nor has it ever had, any financial interest in the Lookabaugh Co. or its predecessors, and that Smith & Wesson, Inc. does not have any control or jurisdiction of the Walter Lookabaugh Co. or its employees.

"That the Walter Lookabaugh Co. buys its own samples and that no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc. to the general jobbing trade throughout the world.

CARL R. HELLSTROM

"Then appeared personally, Carl R. Hellstrom, President of Smith & Wesson, Inc., and swore that the above recited facts are true and correct to the best of his knowledge and belief.

VERA G. ROCKSTROK

"My commission expires
Nov. 8, 1963"

On hearing the Superior Court granted the motion to quash and made the following determinations of fact:

"(1) Walter Lookabaugh is not (a) an officer of defendant Smith & Wesson, Inc., nor (b) The general

manager in this state of said defendant, nor (c) the designated agent of said defendant for service of process in California;

"(2) That defendant Smith & Wesson, Inc., is not doing business in California in the sense required to make it amendable to process there." (Cl. Tr., page 58). Appendix, page 18a *et seq.*, at pages 19a and 20a.

The decision of the Superior Court of the State of California in and for the County of Kern was affirmed by the District Court of Appeal, Fourth Appellate District, State of California, reported at 338 P. 2d 596, 170 A.C.A. 244, Appendix, page 8a *et seq.*

The Supreme Court of the State of California reversed the District Court of Appeal and set aside the findings of fact of the Superior Court and found on the basis of the affidavit of Carl R. Hellstrom that under the minimum contacts test established in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66, S. Ct. 154, 90 L. Ed. 95, Smith & Wesson, Inc., was doing business in the State of California sufficient to make it amenable to the jurisdiction of the California courts, and that service upon Walter K. Lookabaugh was sufficient to apprise Smith & Wesson, Inc., of such service even though not an agent of Smith & Wesson, Inc.

A petition for writ of certiorari has been filed in the United States Supreme Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of the State of California at page 6 of its decision in the *Cosper* v. *Smith & Wesson, Inc.* matter here presented states that the decision is in accordance with and not in conflict with *Inter-*

national Shoe Co. v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2nd 223. The more recent case of *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2nd 1283, is neither cited or discussed.

The Supreme Court of the State of California has adopted the language of *International Shoe Co.* v. *Washington* (*supra*) as a test to determine whether or not a foreign corporation is in fact doing business within the State to make it amenable to *in personam* jurisdiction, the test being that there are sufficient contacts with the state to "make it reasonable and just according to traditional concepts of fair play and substantial justice."

The same California court within a month of the decision in the *Cosper* case decided *Fisher Governor Co.* v. *Superior Court*, 53 A. C. 2nd 221, 53 Cal. 2nd —. The court stated that the same rule applied, to-wit, sufficient contacts to make it reasonable and just according to traditional concepts of fair play and substantial justice, but that factually the *Fisher Governor Co.* case did not have such minimum contacts. In ariving at this conclusion, the Supreme Court of the State of California stated and as is borne out by the record, that the facts concerning doing business were identical in the *Fisher Governor* case and the *Cosper* v. *Smith & Wesson* case, but that the *Fisher Governor Co.* case did not have minimum contacts in view of the fact that the tort occurred in Idaho, and the injured persons were non-residents of California. The Supreme Court of California has therefore established as the constitutional law under the due process clause of the United States Constitution that the minimum con-

tacts rule promulgated in the *International Shoe Co.* v. *Washington* (*supra*), applies against foreign corporations where the following minimum contacts exist:

1. A tort occurs in the State of California, and

2. The injured party is a resident of the State of California.

This interpretation of the Supreme Court of the State of California as to what factual matters comply with the doctrine of the *International Shoe Co.* case is not borne out by the language of said case. That case in 326 U.S., at page 319, in describing the requirements of due process with regard to the situation here involved, states the requirement as follows:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of due process to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."

The very recent case decided March 10, 1959, U. S. District Court, District Minnesota, Fourth Division, is directly in point and diametrically opposed to the California interpretation of the *International Shoe Co.* case and the Fourteenth Amendment to the Constitution of the United States. This case is *Mueller* v. *Steelcase, Inc.*, 172 Fed. Supp. 416. It involved the constitutionality of a Minnesota statute authorizing Minnesota courts to take jurisdiction over foreign corporations in the following situations:

> "If such foreign corporation commits a tort in whole or in part in Minnesota against a resident

> of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the Secretary of State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process of any actions or proceedings against the foreign corporation arising from or growing out of such contract or tort."

This statute was struck down as unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution in that the mere commission of a tort in a state injuring a resident without more minimum contacts is not sufficient. At page 420, the court characterizes the statute as follows:

> "Here, this defendant has no 'contacts, ties, or relations' in this state within the concept of the teachings of the International Shoe Co. case. Jurisdictional rights are of substance, and at least they deserve consideration from the viewpoint of fair play and substantial justice. The enactment of this statute is a classic example of an attempt by a State to eliminate by one fell swoop all such jurisdictional rights of a foreign corporation in a tort claim against it when damage has resulted to a Minnesota citizen. This assumes to obliterate all conditions precedent heretofore considered essential to the State's jurisdiction over a foreign corporation in a tort action. It seems evident that the enforcement of this statute under the circumstances herein cannot be sustained under the due process clause of the Federal Constitution."

Petitioner submits that this same characterization applies with full force to the judicial legislation of the Supreme Court of the State of California in their holding that the essential requirements are only that a

tort occurs in the State of California and that a California resident be injured.

—2. The history of the susceptibility of a foreign corporation to the jurisdiction of a state court is long, involved, and the subject of frequent decisions by the Supreme Court of the United States. This history may well be said to commence with *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565. It would serve no substantial purpose in this petition for writ of certiorari to trace in detail the course of the development of the law regarding the right of a state to subject a foreign corporation to *in personam* jurisdiction except to note that the culmination of this phase of due process is to be found in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95. The most recent decisions of the United States Supreme Court on the point are *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2nd 223, and *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283.

The *Hanson* case is the most recent pronouncement by this court on the question of the right of a state court to subject a foreign entity, whether corporate or otherwise, to *in personam* jurisdiction of the state court. In the *Hanson* case Mr. Chief Justice Warren, at 357 U.S. 250, discussed the *McGee* case and at page 251 the case of *International Shoe Co.* v. *State of Washington* (*supra*) and in the course of that discussion relating to an asserted trend in the decisions as exemplified by *International Shoe* and *McGee* commented as follows:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See

Vanderbilt v. *Vanderbilt*, 354 U.S. 416, 418, 77 S. Ct. 1360, 1362, 1 L. Ed. 2d 1456. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 159, 90 L. Ed. 95."

In the *Cosper* case the California Supreme Court found, contrary to the findings of fact by the Judge of the Superior Court, that the activities of Walter Lookabaugh constituted the doing of business in the State of California by Smith & Wesson, Inc. In this regard Chief Justice Warren in the *Hanson* case commented at page 253 of the decision that:

"* * * the unilateral activity of those who claim some relationship with a non resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 156, 90 L. Ed. 95."

The decision of the majority in the *Hanson* case at page 254 holds that a forum state "does not acquire that jurisdiction by being the center of gravity of the controversy, or the most convenient location for litiga-

tion. The issue is personal jurisdiction, not choice of law."

These comments of the court in *Hanson* v. *Denckla*, *supra*, may be applied most emphatically to the action of the California Supreme Court in *Cosper* v. *Smith & Wesson, Inc.* Walter Lookabaugh was no more than an employee of an independent contractor, namely, Walter Lookabaugh, Inc., an independent corporation not connected in any way whatsoever with Smith & Wesson, Inc.

See: *Ludwig* v. *General Binding Corporation*, 21 F. R. D. 178.

The effect of the decision of the California Supreme Court in the *Cosper* case is to effectively erase and eliminate all effects whatsoever of state boundaries on the question of jurisdiction over foreign corporations and to whittle away the concept of the required contacts and connections in this state to sustain jurisdiction. The door is now open in California to practically unlimited juridiction over foreign corporations.

See: *Mueller* v. *Steelcase, Inc.*, 172 F. Supp. 416.

Judge Sobeloff of the Fourth Circuit Court of Appeals considered the question of the presence of a foreign corporation in the forum state in *Erlinger Mills* v. *Cohoes Fibre Mills*, 239 F. 2nd 502, and there held that the *International Shoe Co.* case would not authorize the State of North Carolina to assume jurisdiction for the purpose of rendering an *in personam* judgment over a New York corporation. In commenting upon the effect of the North Carolina statute decreeing that every foreign corporation is subject to suit in North Carolina where there is a reasonable expectation that

the goods produced by such foreign corporation are to be used and consumed in North Carolina, the court remarked as follows:

> "To illustrate the logical and not too improbable extension of the problem, let us consider the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires. As in the hypothetical case, the sale in the principal case was 'with the reasonable expectation that these goods are to be used or consumed in (the vendee's domicile) and are so used and consumed.' It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states."

Judge Sobeloff's hypothetical situation is precisely the situation found in *Cosper* v. *Smith & Wesson, Inc.* The weapon about which complaint is made was manufactured in the State of Massachusetts.

3. The Supreme Court of the State of California in its interpretation of California Corporations Code Section 6500 distorts normal syntax in holding that service upon an employee of an independent contractor is service upon the "general manager within the state" of a foreign corporation, which, in fact, has no employees, agents, managers, or anyone over whom it exercises dominion or control within the state, and by this interpretation, likewise violates the due process clause of the United States Constitution.

Section 6500 of the California Corporations Code provides for service on foreign corporations in the part pertinent here as follows:

> "To the president or other head of the corporation, vice president, a secretary, an assistant secretary, the general manager in this state, or if the corporation be a bank to a cashier or assistant cashier."

In the instant action, it is conceded that there was no service on any of these designated people, but only a service upon Walter K. Lookabaugh. It is also established that Walter K. Lookabaugh is not an agent, servant, or employee of any kind or nature of Smith & Wesson, Inc., and the most that can be said of him is that he is an agent or employee of Walter Lookabaugh Company a corporation which has an independent contractual relationship with Smith & Wesson, Inc. To arrive at this conclusion, the Supreme Court of the State of California, of necessity, holds that the language "general manager in this state" means anyone who is in the opinion of the court sufficiently close to the foreign corporation that it appears likely that said foreign corporation will receive notice of the service. The determination of such an ephemeral matter would be one of degree, theoretically descending to the office boy or the janitor.

Section 6500 of the Corporations Code of the State of California as so interpreted is not in conformity with the interpretations of similar type statutes by the Federal Courts with regard to whether or not the test of due process has been made in the selection of the party to be served. *International Shoe Co. v. Washington* (*supra*), definitely required the presence in the state of agents of the foreign corporation even though their agency may be limited and restricted. They must be subject to direction and control through agency of the principal. In that case, at page 320, in discussing

the service and in upholding the service made in the State of Washington the court says, "We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of suit." In that same case on both the issue of due process and the issue of service the existence of salesmen who were in fact agents in the state is compelling upon the court in arriving at its decision.

See: *Rock-Ola Manufacturing Corporation* v. *Wertz*, 249 F. 2nd 813.

Ludwig v. *General Binding Corporation*, 21 F. R. D. 178.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted.

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Certificate

I hereby certify that copies of this brief have been served on Morris B. Chain, Attorney for respondent Harold L. Cosper, this day of February 1960 by depositing the same in a United States mail box, air mail postage prepaid, to his post office address at 231 Sill Building, Bakersfield, California.

.....

Counsel for Petitioner

APPENDIX

Opinion

(Filed Nov. 20, 1959)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

L. A. 25485

HAROLD L. COSPER, *Plaintiff and Appellant,*

v.

SMITH & WESSON ARMS CO. (a Corporation), E. MORTON PITT, ET AL., *Defendants,*

SMITH & WESSON, INC., *Respondent.*

Plaintiff, a police officer, brought this action for personal injuries allegedly sustained in this state when the cylinder of a revolver, purchased by him in this state from defendant Pitt and manufactured by Smith & Wesson, Inc., a Massachusetts corporation, "exploded and blew apart" during target practice, causing the permanent loss of vision of plaintiff's right eye. Summons and complaint were served on Walker K. Lookabaugh as the alleged agent, sales manager and manufacturer's representative for Smith & Wesson. The service was in pursuance of section 6500 of the Corporations Code: "Delivery by hand of a copy of any process against a foreign corporation (a) to . . . the general manager in this State . . . shall constitute valid service on the corporation."

Smith & Wesson specially appeared and moved to quash the service upon the ground that it was not "doing business" in this state and maintained no agent here upon whom process might be served. The motion was heard upon affidavits, including certain depositions considered as such affidavits. The court found that Lookabaugh was neither "an officer," the "general manager" in this state

nor the "designated agent" of Smith & Wesson "for service of process in California"; and that Smith & Wesson was "not doing business in California in the sense required to make it amenable to process" here. From the order thereupon entered quashing the service on Smith & Wesson, plaintiff appeals.

Plaintiff claims that the admitted activities of Smith & Wesson in this state establish that it was "doing business" here so as to be amenable to the service of process, and that proper service was effected upon it by serving Lookabaugh. He further contends that the court's contrary findings are not supported by the evidence but constitute only erroneous conclusions of law. The single affidavit filed in support of Smith & Wesson's motion to quash service was that of its president. Despite the document's conclusionary averments, the facts that it recites disclose that Smith & Wesson had sufficient contacts with this state to render it amenable to such service of process.

This affidavit recites that Smith & Wesson, Inc., is a Massachusetts corporation with offices in Springfield and is not qualified to do business in this state; that it "has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against [it] in California"; that it has no offices nor any property or assets in this state; that it "does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an overriding discount, or commission, on business initiated by them"; that the "Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field"; that there is no contract with Lookabaugh Co. except that they were "to

promote on a non-exclusive basis the sale of our products on the West coast against a straight commission of 5%"; that Smith & Wesson, Inc., has no financial interest in the Lookabaugh Co. nor any control over this company or its employees; that Lookabaugh Co. buys its own samples and "no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc., to the general jobbing trade throughout the world."

This affidavit discloses that Smith & Wesson's products are distributed in California; that Lookabaugh Co., a manufacturer's representative, promoted its business here though not on an exclusive basis, and distributed general advertising matter furnished by Smith & Wesson. It therefore appears that the material factual averments of defendant's affidavit do not contradict but rather coincide with plaintiff's extended showing of Smith & Wesson's activities in this state through its agreement with Lookabaugh for servicing dealer accounts, investigating and recommending prospective dealers to Smith & Wesson, arranging publicity, distributing advertising, and handling and reporting on complaints concerning defects in Smith & Wesson's products. In short, this is not a true case of conflicting evidence in which a reviewing court will refuse to disturb findings based thereon. (Griffith Co. v. San Diego Col. for Women, 45 Cal. 2d 501, 507-508; Murray v. Superior Court, 44 Cal. 2d 611, 619; Fuller v. Lindenbaum, 29 Cal. App. 2d 227, 230.)

Reference has been hereinabove made to plaintiff's "extended showing" of Smith & Wesson's activities in this state. This showing was made largely through the depositions of several witnesses. On the hearing of the motion, Smith & Wesson objected to the offer of these depositions upon the ground that it had not been served with notice of the taking of said depositions. The trial court's memorandum opinion shows that it treated said depositions "as affidavits, despite the circumstances under which they were

obtained," and that it "read and considered all sworn evidentiary statements before it." The originals of all depositions considered by the trial court have been forwarded to this court. Smith & Wesson still objects to the consideration of said depositions and contends that without the aid thereof, plaintiff failed to sustain his burden of proof. In our opinion, said depositions were properly before the trial court, and are properly before this court, like all other ex parte affidavits which were used by the parties in support of, or in opposition to, the motion. (Code Civ. Proc., § 2009.) Furthermore, as above indicated, the material portions of said depositions merely describe in greater detail the admitted activities of Smith & Wesson in this state as shown by the affidavit of its president, and there is therefore no real conflict in the material factual averments.

The validity of the service of process pursuant to section 6500 of the Corporations Code depends first on whether the foreign corporation is "doing business in this State" within the meaning of the statute. (Code Civ. Proc., § 411, subd. 2.) As this court said in Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, at page 858: "That term is a descriptive one that the courts have equated with such minimum contacts with the state 'that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 [66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057].) Whatever limitation it imposes is equivalent to that of the due process clause." In essence, the statutory term "is synonymous with the power of the state to subject foreign corporations to local process." (Eclipse Fuel etc. Co. v. Superior Court, 148 Cal. App. 2d 736, 738; see also Carl F. W. Borgward, G.M.B.H., v. Superior Court, 51 Cal. 2d 72, 75; Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d 211, 218.)

From the record it indisputably appears that Smith & Wesson had a continuing arrangement for the distribution and sale of its products throughout this state. Said defendant had retained a manufacturer's representative, Lookabaugh, for the promotion of sales for the servicing of dealer accounts, and for the distribution of advertising material which defendant furnished in furtherance of its selling activity. Such a regular course of business dealings in sales promotion within the state is similar to the regular purchasing activities of the foreign corporation in the Jahn case and the regular selling activities of the foreign corporation in the Borgward case. Though self-employed as a manufacturer's representative, Lookabaugh was performing much the same type of substantial selling services for Smith & Wesson through a course of regularly established and systematic business activity as were deemed in Gray v. Montgomery Ward, Inc., 155 Cal. App. 2d 55, to constitute "doing business" in the state by the foreign corporation there involved. These services may reasonably be said to have given Smith & Wesson "in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force." (Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 136.) Certainly, the admitted activities of Smith & Wesson in this state are more significant than the minimal contacts deemed sufficient in McGee v. International Life Insurance Company, 355 U.S. 220, where the foreign corporation elected to deal with its insured, a California resident, only by mail.

It further appears that the gun which exploded was sold in this state, the accident occurred in this state, the plaintiff is a resident of this state, and many of the witnesses who will probably be called at the trial are present in this state. Therefore, in view of all the facts, we deem it not inconsistent with "traditional notions of fair play and substantial justice" to subject the defendant Smith

& Wesson to the jurisdiction of the courts of this state in this action.

The second consideration in testing the validity of service under section 6500 of the Corporations Code is whether the person served is within the statutory designation—here "the general manager in this State" for Smith & Wesson. In this regard, it has been said that "every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made," and by service on such an agent, "the requirement of the statute is answered." (Eclipse Fuel etc. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 746.) Whether in any given case, the person served may properly be regarded as within the concept of the statute depends on the particular facts involved. (Ibid; Millbank v. Standard Motor Const. Co., 132 Cal. App. 67, 71; Roehl v. The Texas Co., 107 Cal. App. 691, 704.) Here, it reasonably appears that Lookabaugh, as a manufacturer's representative actively engaged in promoting the sales of Smith & Wesson and earning commissions through such sales, would have ample regular contact with Smith & Wesson and would be of "sufficient character and rank to make it reasonably certain" that Smith & Wesson would be apprised of the service of process. Neither the fact that Lookabaugh's organization was designated as "manufacturer's representatives" nor the fact that such representatives promoted sales "on their own time and expense" is determinative here. Whether Smith & Wesson was operating "through an independent contract, agent, employee or in any other manner" (Gray v. Montgomery Ward, Inc., supra, 155 Cal. App. 2d 55, 58; Fielding v. Superior Court, 111 Cal. App. 2d 490, 494; see also Eclipse Fuel etc. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 740), the essential factor is that Lookabaugh in his selling and advertising activities was performing services for Smith & Wesson and providing it with the opportunity for "regular contact with its cus-

tomers and a channel for a continuous flow of business into the state." (Sales Affiliates, Inc. v. Superior Court, supra, 96 Cal. App. 2d 134, 136.) In short, the arrangement of Smith & Wesson with Lookabaugh appears, in the light of the president's affidavit, to have given Smith & Wesson substantially the business advantages that it would have enjoyed "if it conducted its business through its own offices or paid agents in the state" (Eclipse Fuel etc. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 740); and such arrangement was sufficient to constitute Lookabaugh "the general manager in this State" for purposes of service of process on Smith & Wesson. (Corp. Code, § 6500.)

It is true that Smith & Wesson has been held to be immune from the service of process in this state. (Smith & Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673.) That ruling was based on a lack of competent evidence showing that Smith & Wesson was "doing business" within this state, but it was expressly recognized that "additional evidence" might show otherwise. (P. 679.) A manufacturer of arms whose products are sold on a wide scale throughout the state through the extensive, regular and continuous services of a "manufacturer's representative" should not be perpetually immune from the service of process in actions brought by residents of this state because of injury sustained from alleged defects in the manufacturer's products. In the present case, there are additional competent and uncontradicted factual averments showing that under the "minimum contacts" doctrine Smith & Wesson is "doing business" within this state, and that its representative Lookabaugh comes within the statutory concept of its "general manager in this State" for the purposes of service of process. (Corp. Code, § 6500.) In such circumstances, "the fair and orderly administration of the laws" (International Shoe Co. v. Washington, 326 U.S. 310, 319) fully justifies subjecting Smith & Wesson to the jurisdiction of our courts.

The order granting the motion to quash service of summons and complaint is reversed.

SPENCE, *J.*

WE CONCUR:

GIBSON, *C. J.*
TRAYNOR, *J.*
SCHAUER, *J.*
PETERS, *J.*
WHITE, *J.*

Dissenting Opinion

I dissent. I would affirm the order for the reasons stated by Mr. Justice Mussell in the opinion prepared by him for the District Court of Appeal in Cosper v. Smith & Wesson, 170 A.C.A. 244, 338 P. 2d 596.

McCOMB, *J.*

(Dist. Court of Appeal—Fourth Dist. Filed May 6, 1959)

IN THE DISTRICT COURT OF APPEAL
FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA

4th Civil No. 5677

HAROLD L. COSPER, *Plaintiff and Appellant,*

v.

SMITH & WESSON ARMS CO., a corporation, et al.,
Defendants.

SMITH & WESSON, INC., *Respondent.*

Opinion

APPEAL from an order of the Superior Court of Kern County granting a motion to quash service of summons. Norman F. Main, Judge.

Affirmed.

Morris B. Chain and Milton M. Younger for Appellant.

Borton, Petrini, Conron & Brown for Respondent.

This is an action for personal injuries alleged to have been sustained by plaintiff when the cylinder of a revolver, purchased by him from defendant F. Morton Pitt and manufactured by Smith & Wesson, Inc., a Massachusetts corporation, "exploded and blew apart", causing the permanent loss of vision in plaintiff's right eye.

Service of summons and complaint on Smith & Wesson, Inc., was attempted to be made by serving Walter K. Lookabaugh as the alleged agent, sales manager and manufacturer's representative for Smith & Wesson Arms Company in California. Special appearance on motion to quash service was made by Smith & Wesson, Inc., supported by the affidavit of Carl L. Hellstrom, president of said company. The motion was heard on this affidavit and on counter affidavits filed by plaintiff. The trial court granted the motion to quash service of summons and plaintiff appeals from the order granting it, claiming that Smith & Wesson, Inc., was "doing business" in the state of California and that proper service upon Smith & Wesson, Inc., was effected by service upon Walter K. Lookabaugh. These issues were tried on affidavits and involved issues of fact.

In Griffith Co. v. San Diego Col. for Women, 45 Cal. 2d 501, 507, 508, the court said:

> "'An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This

rule is equally applicable whether the evidence is oral or documentary.'"

In Fuller v. Lindenbaum, 29 Cal. App. 2d 227, 230, on an appeal from an order granting a motion to quash service of summons, the court said:

> "Furthermore, in the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, an appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established. (Citations.)"

In Murray v. Superior Court, 44 Cal. 2d 611, 619, it is said that an appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated; that when the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify; that so far as it has passed on the weight of the evidence, its implied findings are conclusive; and that this rule is equally applicable whether the evidence is oral or documentary.

The affidavit of Carl R. Hellstrom, president of Smith & Wesson, Inc., filed in support of the motion to quash, is as follows:

> "I, Carl R. Hellstrom, President of Smith & Wesson, Inc. on oath depose and say:
>
> "That Smith & Wesson, Inc. is a Massachusetts Corporation with its offices and manufacturing facilities in Springfield, Massachusetts.
>
> "That Smith & Wesson, Inc. is not qualified to do business in California, and has not filed an application to

do business in California, and has not requested the Secretary of State, or other lawful authority, to do business in California.

"That Smith & Wesson, Inc. has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against Smith & Wesson, Inc. in California.

"That Smith & Wesson, Inc. has never had, nor does it now have offices in California, nor has it held any sales conventions in California.

"That Smith & Wesson, Inc. has no property, inventory or assets in California.

"That Smith & Wesson, Inc. does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an over-riding discount, or commission, on business initiated by them.

"That the Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field.

"That Smith & Wesson, Inc. has never had, nor does it now have, any contract or agreement with them except that they were, in common with their other lines, to promote on a non-exclusive basis the sale of our products on the west coast against a straight commission of 5%.

"That Smith & Wesson, Inc. does not now have, nor has it ever had, any financial interest in the Lookabaugh Co. or its predecessors, and that Smith &

Wesson, Inc. does not have any control or jurisdiction of the Walter Lookabaugh Co. or its employees.

"That the Walter Lookabaugh Co. buys its own samples and that no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc. to the general jobbing trade throughout the world.

s/ CARL R. HELLSTROM

"Then appeared personally, Carl R. Hellstrom, President of Smith & Wesson, Inc., and swore that the above recited facts are true and correct to the best of his knowledge and belief.

s/ VERA G. ROCKSTROH"

In opposition to the motion appellant filed the affidavit of counsel for appellant in which he stated that on May 7, 1957, he took the deposition of Walter K. Lookabaugh in which Lookabaugh made certain statements relative to his business transactions with Smith & Wesson, Inc. This deposition was not signed or filed with the trial court and the court ruled that it was not admissible. Moreover, the statements in the affidavit of counsel alleged to have been made by Lookabaugh are clearly hearsay and of no probative value. Other statements of counsel in his affidavit are made on information and belief.

In the affidavit of Lynn A. White, deputy chief of police in Los Angeles, filed in opposition to the motion, affiant states that in 1956 he wrote to Smith & Wesson, Inc., asking that a representative of the company be sent to call upon them to discuss alleged structural weaknesses of Smith & Wesson firearms and that Lookabaugh called upon him and stated that he was a representative of the company and had come to discuss complaints.

Depositions of Hannah A. Giegerich, Frank W. Symonds and Harold O. Austin were offered by appellant. Objection to these depositions and motions to suppress them were made by Smith & Wesson, Inc., and the trial court ruled that they were not admissible as depositions since they were taken without notice. However, the court evidently considered them as affidavits. These alleged depositions or affidavits are not made a part of the record before us and while they might result in a conflict in the evidence, the facts stated in the affidavit of Carl Hellstrom, president of Smith & Wesson, Inc., substantially support the trial court's conclusions that

> "1) Walter Lookabaugh is not (a) an officer of defendant Smith and Wesson, Inc., nor (b) 'the general manager in this state' of said defendant, nor (c) the designated agent of said defendant for service of process in California;
>
> "2) That defendant Smith and Wesson, Inc., is not doing business in California in the sense required to make it amenable to process there."

In Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d 211, 217, the court, in discussing the concept of "doing business" which will subject a foreign corporation to local process, quoted the following from Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 388:

> "'By way of recapitulation of the current state of the law under the evolving concept of the "doing business" requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. The court must be astute to weigh

the facts of the individual case to determine whether the particular type of activity in, relation to, or nexus with, the forum is of such substance as will make it just and equitable to conclude that a corporation is "doing business" in the sense required by the purpose at hand.' "

In West Publishing Co. v. Superior Court, 20 Cal. 2d 720, 727, it is said:

" 'A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state the process will be valid only if served upon some authorized agent.' The determination of this jurisdictional question 'is often a matter of great difficulty and extreme nicety. No all-embracing rule as to what is doing business has been laid down.' "

In the instant case the affidavit of the president of Smith & Wesson, Inc., establishes on appeal not only the facts stated therein but all facts which reasonably may be inferred therefrom. It appears from said affidavit that Smith & Wesson, Inc., is a Massachusetts corporation with its offices and manufacturing facilities in Springfield, Massachusetts; that it is not qualified to do business in California; that it has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints for the company; that it has no offices in California and has no property inventory or assets in California; that it does not solicit retail business but distributes its products f.o.b. Springfield through regular and dealer channels; that sales promotions are principally conducted by firms known as manufacturers' representatives, which on their own time and at their own expense solicit business in several

allied lines against an overriding discount or commission on business initiated by them; that the company has never had a contract or agreement with the Lookabaugh Company, except that they were, in common with other lines, to promote on a nonexclusive basis the sale of Smith & Wesson products on the west coast against a straight commission of five per cent; that Lookabaugh Company buys its own samples and that no help or assistance is given them by Smith & Wesson except such advertising material as is furnished by Smith & Wesson to the general jobbing trade throughout the world.

Accepting the foregoing facts stated in said affidavit as true, and the facts which reasonably may be inferred therefrom, we can not say as a matter of law that Smith & Wesson, Inc., was "doing business" in California under the rules announced in the foregoing decisions.

As is said in Jeter v. Austin Trailer Equipment Co., supra, 122 Cal. App. 2d 376, 381: "Whether a corporation is doing business in a state in the sense required by a process statute is peculiarly dependent upon the facts of the particular case." And in Confidential, Inc. v. Superior Court, 157 Cal. App. 2d 75, 79, it was held that "The burden rests upon a plaintiff who has served process upon a foreign corporation to establish that it was doing business in the state at the time of service, or had other sufficient contacts with its people or affairs to warrant the inference that it had subjected itself to the state's jurisdiction. (Citations.)"

The implied finding of the trial court that plaintiff failed to establish that Smith & Wesson, Inc., was doing business in the state of California is supported by the record before us. The purported service was not made on the secretary of state as provided for in Corporations Code, section 6501, nor was a preliminary order under said section obtained. Service was attempted under section 6500 of the Corporations Code, which provides for service of process on a

foreign corporation by delivery by hand of process to "(a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the *general manager in this State*, or if the corporation be a bank to a cashier or an assistant cashier, . . ." (Italics added.) Appellant's contention is that Walter K. Lookabaugh is the general manager of Smith & Wesson, Inc., in this state. The burden of proving that Lookabaugh was the authorized agent or general manager of said corporation in this state was upon plaintiff. In this connection, it appears from the affidavit of Carl H. Hellstrom that Smith & Wesson, Inc., has no agents, salesmen or other employees residing in California and there is no evidence that Lookabaugh was or is the general manager of said corporation. On appeal we are required to accept the statement of Hellstrom as true. (Fuller v. Lindenbaum, supra, 29 Cal. App. 2d 227, 228.) In West Publishing Co. v. Superior Court, supra, 20 Cal. 2d 720, 727, it is held that even if a foreign corporation is doing business in this state the process will be valid only if served upon some authorized agent. The same rule is recognized in Jeter v. Austin Trailer Equipment Co., supra, where the court said, at page 388:

> "A foreign corporation may be doing business in a state through the instrumentality of independent contractors located therein, yet those persons through whom its local business is conducted may not be so bound to the foreign corporation as to make them agents capable of receiving process on behalf of the corporation (Citation.)" .

In Smith & Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673, an attempt was made to support the agency of Lookabaugh by the statements of Lookabaugh to an investigator that he was a sales representative of the corporation and had an office in San Francisco. It was there held that the statements of Lookabaugh were not

admissible to prove that he was an agent of the company. It was further held that the facts adduced at the hearing of the motion to quash service of summons and complaint were not sufficient to make Smith & Wesson, Inc., amenable to process of the courts of this state.

Appellant relies heavily on Gray v. Montgomery Ward, Inc., 155 Cal. App. 2d 55, also decided by this court. In that case defendant Duro-Metal Products Company filed a special appearance and motion to set aside service of summons and complaint on the ground that the corporation was not doing business in California. The matter was heard on affidavits and the affidavit of E. Bellezzo, the manufacturer's agent handling Duro-Metal products in California, showed that he was the manufacturer's agent in California; that he called upon dealers and prospective dealers in California and new dealers were appointed upon his recommendation; that he checked proposed dealers credit, type of distribution and type of salesmen employed. He testified that once a dealer for Duro was appointed he called upon him urging him to stock with and promote sales of Duro-Metal products; that he occasionally delivered catalogues and brochures furnished by Duro-Metal Products to dealers and was under the supervision of a sales manager who maintained an office in Illinois; that he received a commission on orders delivered to him personally and on others mailed directly to the company. Under the circumstances, it was held that Duro-Metal was doing business through him. The factual situation in that case differs materially from that in the case before us and the opinion is not inconsistent with what we have heretofore said herein.

The record shows that on July 14, 1958, appellant filed an application herein to produce additional evidence, including the deposition of Walter K. Lookabaugh. The application was denied by order of this court on August 27, 1958. Appellant, at the oral argument on appeal herein, made a motion that we reconsider the previous ruling on

the application. The deposition of Walter K. Lookabaugh was lodged with the court and, while it was not received as additional evidence, we have read and considered it. The motion to reconsider is denied.

The order granting the motion to quash summons and complaint is affirmed.

MUSSELL
J.

WE CONCUR:

GRIFFIN
P. J.

SHEPARD
J.

No. 68898

COSPER

v.

SMITH AND WESSON.

Memorandum of Ruling on Motion to Quash

The documents filed in this case as "depositions" of Austin, Symonds and Giegerich are not admissible as such against defendant Smith and Wesson, Inc., since they were taken without notice to said defendant. The same will be true of the deposition of Lookabaugh, if and when filed, it having been taken before the time of purported service on Smith and Wesson by delivery of process to Lookabaugh, and without notice to Smith and Wesson.

However since these "depositions" do constitute statements of these witnesses under oath, it does not necessarily follow that the court in ruling on the motion to quash now before it may ignore their character as affidavits, despite the circumstances under which they were obtained.

The court has also before it affidavits of Morris B. Chain re Lookabaugh's statements on deposition, and the affidavits of Lynn White and Carl R. Hellstrom. Mr. Hellstrom is president of defendant Smith and Wesson, the moving party on the motion to quash.

Mr. Chain's affidavit is probably not admissible for any purpose (*Smith and Wesson* v. *Municipal Court*, 136 CA 2d 673, 679); and like objections have been made to the several "depositions".

The file reflects that plaintiff properly served notice of a motion to take the deposition of Mr. Hellstrom in Massachusetts, obtained an order to that effect and had the commission issued, but never took the deposition of this witness.

Instead, through inadvertence of this court, plaintiff obtained a new commission to take the depositions in Massachusetts of two other and different witnesses, also employees of defendant Smith and Wesson. Plaintiff did not serve on defendant Smith and Wesson any notice of his application for the new commission, nor of the time and place of taking the depositions of these two witnesses, Austin and Symonds. However the "depositions" were taken, and are now offered by plaintiff as affidavits in opposition to the motion to quash. Likewise the deposition of Giegerich was taken without notice to Smith and Wesson, and is now offered.

The court has now read and considered all sworn evidentiary statements before it, and concludes therefrom that by a preponderance of the admissible evidence before it

1) Walter Lookabaugh is not (a) an officer of defendant Smith and Wesson, Inc., nor (b) "the general manager in this state" of said defendant, nor (c) the designated agent of said defendant for service of process in California;

2) That defendant Smith and Wesson, Inc., is not doing business in California in the sense required to make it amenable to process there.

The motion to quash service of summons on defendant Smith and Wesson, Inc., is granted.

MAIN
Judge

Dated: January 21, 1958

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

No. 68898

HAROLD L. COSPER, *Plaintiff*

v.

SMITH & WESSON, INC., E. MORRIS PITT, et al., *Defendants*

Good cause appearing therefor, it is hereby ordered that the Defendant Smith & Wesson, Inc. may have to and including the 13th day of March, 1960 within which to appear, plead or otherwise move in the above entitled and numbered action.

Dated January 13, 1960.

s/ ROBERT B. LAMBERT
Judge

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FILED

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[redacted]

No. 701.

SMITH & WESSON, Inc. (a corporation),

Petitioner,

vs.

HAROLD L. CRAIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 701

SMITH & WESSON, INC. (a corporation),

Petitioner,

vs.

HAROLD L. COSPER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Respondent filed an action in the Superior Court of the State of California, County of Kern, for negligence and breach of warranty against Smith & Wesson, Inc., and F. Morton Pitt on December 21, 1956. [Clk. Tr. p. 2.] The Complaint alleged the sale to respondent in July, 1955, of a "Combat Masterpiece Revolver" by F. Morton Pitt, a retailer, and further alleged that the revolver was negligently manufactured by Smith & Wesson, Inc. While respondent, a police officer, was target practicing on January 4, 1956, the complaint states, the revolver exploded causing serious injury to his right eye with a resulting permanent loss of vision. The complaint and summons were served upon F. Morton Pitt and upon "Walter K. Lookabaugh, as agent of the Smith & Wesson Arms Co., Salesmanager of the Smith & Wesson Arms Co., for the eleven western states, including California, and Manu-

facturer's Representative for Smith & Wesson Arms Co., in California."

Defendant F. Morton Pitt answered and denied breach of warranty or negligence, and alleged contributory negligence by respondent. [Clk. Tr. p. 8.] Petitioner Smith & Wesson, Inc., appearing specially, then filed a notice of motion to quash the service of summons on the ground that it was a Massachusetts' Corporation not "doing business" in the State of California and maintained no agent here upon whom process might be served. [Clk. Tr. p. 15.]

The matter was heard upon the oral arguments of counsel, the affidavits of counsel for respondent [Clk. Tr. p. 22] and of Lynn A. White, Deputy Chief and Commander of the Personnel & Training Bureau of the Los Angeles Police Department [Clk. Tr. p. 31] and the depositions of Hannah A. Giegerich, Office Manager for Walter K. Lookabaugh, and Harold Owen Austin and Frank Willis Symonds, the Sales Manager and the Assistant Treasurer of Smith & Wesson, Inc. The single affidavit filed in support of this motion to quash was that of Carl R. Hellstrom, the President of Smith & Wesson, Inc. [Clk. Tr. p. 18.]

Unfortunately, the deposition of Walter K. Lookabaugh was not on file with the Superior Court because of the refusal of the deponent to sign or return it and could not be considered by that Court. However, pursuant to an order of the Los Angeles Superior Court made on June 2, 1958, Lookabaugh subscribed and returned his deposition and this important evidence was received and considered by the California Supreme Court (Opinion of Supreme Court of the State of California, Pet. App. p. 4a *et seq.*)

The Superior Court granted the motion to quash service of summons [Clk. Tr. p. 59] and respondent ap-

pealed from that order. The District Court, still without the benefit of the Lookabaugh deposition, affirmed the order of the lower court. (Opinion of the District Court of Appeal of the State of California, Pet. App. p. 8a *et seq.*)

The Supreme Court of the State of California, relying heavily upon and referring often to the theretofore unconsidered deposition of Lookabaugh, reversed the order granting the motion to quash and found that Smith & Wesson was "doing business" in the state under the minimum contacts test established in *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, and further defined in *McGee v. International Life Insurance Co.*, 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 223, and that proper service upon Smith & Wesson was effected by the service made upon Walter K. Lookabaugh, "the general manager in this State" for purposes of service of process.

The Law Applicable to This Case.

The legal boundaries in the field of judicial jurisdiction over foreign corporations which were established by *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, in 1878, have been greatly expanded by more recent decisions of this Court. The current law is contained primarily in *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, and in the two most recent but less comprehensive decisions in *McGee v. International Life Insurance Co.*, 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223, and *Hanson v. Denckla*, 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283.

The *International Shoe Co.* case, decided in 1945, involved an attempt by the State of Washington to en-

force an assessment of contributions to its state unemployment fund. Thirteen salesman of a Delaware corporation, having authority only to solicit orders, traveled within the State of Washington. This was held on the appeal, by Mr. Chief Justice Stone, to satisfy the fundamental test of judicial jurisdiction, *i.e.* that there be "certain minimum contacts" with the state of the forum in order that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" These contacts were sufficient to "make it reasonable . . . to require the corporation to defend the particular suit which (was) brought there."

In *McGee v. International Life Insurance Co., supra*, decided in 1957, Mr. Justice Black noted that there existed a steady trend

> ". . . toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportations and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity."

In the *McGee* case, an insured, domiciled in California, had purchased a life insurance policy from a company incorporated in Arizona which solicited business in California by mail but maintained no office or sales personnel in California. Thereafter, the defendant, a Texas cor-

poration, assumed the insurance obligations of the Arizona corporation and mailed from Texas an offer to continue the insurance in accordance with the terms of the original policy. The insured accepted the offer by mail and mailed premiums to Texas. When the insured died and the company refused to pay his beneficiary, she sued and recovered under a California statute which permits its residents to sue non-resident insurance companies in California on policies solicited by mail from outside the State or for which premiums are collected by mail, provided the insured is physically within the state.

On appeal from the refusal of the Texas courts to enforce the California judgment thus obtained, Mr. Justice Black held that it was "sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State" where the suit was brought. This substantial connection was that (1) the contract had been delivered in California; (2) the premiums had been mailed from California and (3) the insured was domiciled in California when he died.

Taken together, the *International Shoe Co.* case and the *McGee* case indicate that the acts relied upon as the connection with the state, must also be connected with the cause of action sued upon. That is, sufficient minimum contacts exist where there are substantial transactions by or on behalf of the foreign corporation within the forum and where the cause of action is connected with those transactions.

The rules established by these two landmark cases must likewise be considered in the light of the 1958 decision in *Hanson v. Denckla, supra.* There the Florida probate court attempted to exercise personal jurisdiction over a Delaware trustee by means of constructive service by pub-

lication, authorized by Florida statute. The trust had been created in Delaware of a corpus located there by a resident of that state who had later become domiciled in Florida. This Court held that the mere domicile of the settlor in Florida, together with the receipt by him of income there, were not sufficiently substantial contracts to make the Delaware trustee amenable to suit in Florida.

> "The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Justices Black, Burton, Brennan and Douglas dissented from this decision on other grounds.

A comprehensive review and analysis of the current state of the law in this field was presented by the Hon. Stanley N. Barnes in *I. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 265 F. 2d 768, decided by the Ninth Circuit on March 10, 1959. After carefully summarizing the decisions in the three cases reviewed above, Judge Barnes adopts the reasoning contained in a current article appearing in 47 Georgetown L. J. 342 (1958), as follows (at p. 773):

> "There are three rules which can be drawn from a combined reading of International Shoe, McGee and Hanson against which all future litigation of a like nature may be tested. * * * The rules are:
>
> (1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction,

may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.

(2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'

(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice.' If this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens." (Pp. 351-352.)

Paraphrasing the wording of the decisions in the *International Shoe*, *McGee* and *Hanson* cases, Judge Barnes restated the test as follows (at p. 773):

"Thus there is established as essential some act by which the defendant 'purposefully' seeks the privilege of conducting activities within the forum state and obtaining the benefit and protection of its laws. This essential act of the defendant must give rise to or result in a cause of action within that forum state. Having once established such substantial minimum contact, it must appear that the assumption of jurisdiction based thereon is in accordance with due process concepts of 'fair play' and 'substantial justice.'"

Reasons Relied Upon for Denial of Writ.

A. Smith & Wesson Inc., Is "Doing Business" in the State of California.

The record before the California Supreme Court establishes the following facts:

1. Walter K. Lookabaugh is the exclusive sales representative of Smith & Wesson in the State of California. [Lookabaugh Dep. p. 19, lines 1-5; p. 28, lines 5-9 p. 57, lines 7-23; p. 29, lines 7-22; Austin Dep p. 30, lines 20-24.]

2. Lookabaugh is paid a commission of 5 per cent by Smith & Wesson on each gun that is sold in his district. [Austin Dep. p. 26, lines 11-12.]

3. Lookabaugh sells Smith & Wesson products at prices established by Smith & Wesson. [Austin Dep. p. 17, lines 11-20; Giegerich Dep. Ex. 13.]

4. Lookabaugh sells Smith & Wesson products to at least 13 wholesale houses within the State of California, and the orders are written up in an order book and forwarded to Smith & Wesson which ships the merchandise directly to the place of business of the purchaser. [Lookabaugh Dep. p. 19, line 19, to p. 23, line 5; Austin Dep. p. 4, lines 2-9; Giegerich Dep. Ex. 37.]

5. Lookabaugh arranges publicity for Smith & Wesson products, gives demonstrations of Smith & Wesson products, and displays and distributes Smith & Wesson advertising brochures and catalogues. [Lookabaugh Dep. p. 28, line 10, to p. 29, line 23; Giegerich Dep. Exs. 4, 8, 14, 15X, 20, 37, 49.]

6. Lookabaugh has received complaints regarding Smith & Wesson products from purchasers, has received correspondence from Smith & Wesson directing his at-

tention to such complaints, and has investigated, adjusted and reported to Smith & Wesson regarding such complaints. [Lookabaugh Dep. p. 30, lines 4-25; p. 31, line 3, to p. 32, line 4; Giegerich Dep. Exs. 6, 7, 12, 19, 22, 24, 25, 44, 48.]

7. Walter K. Lookabaugh has met and discussed the terms of the oral agreement between Lookabaugh Co. and Smith & Wesson with officers of Smith & Wesson in the State of California and at the Smith & Wesson factory in Massachusetts. [Lookabaugh Dep. p. 32, lines 5-25; p. 43, lines 1-15; p. 44, line 24, to p. 45, line 13.]

8. In response to a letter of complaint directed to Smith & Wesson by Lynn A. White, Deputy Chief of Police of the Los Angeles Police Department, Chief White was informed that Walter K. Lookabaugh would call upon him regarding the complaint and, within a few days, Walter K. Lookabaugh did call and state that he was a representative of Smith & Wesson and had come to discuss the complaints made in the letter sent to Smith & Wesson. [Clk. Tr. pp. 31-32; Lookabaugh Dep. p. 35, line 8, to p. 36, line 22; Austin Dep. p. 10, lines 18-22; p. 13, line 13, to p. 14, line 10; p. 15, lines 6-15.]

9. Walter K. Lookabaugh presented a business card to Chief White and to other customers upon which appeared the letters "SW," the Smith & Wesson registered trademark, and, thereunder "SMITH & WESSON, SPRINGFIELD, MASSACHUSETTS" and, in the lower left corner, "REPRESENTED BY WALTER LOOKABAUGH, TILDEN SALES BUILDING, SAN FRANCISCO," and, underneath that written in ink, "Kelly Lookabaugh," and, in the right corner, "Los Angeles Office, 1077 Point View Street." [Lookabaugh Dep. p. 38, line 13, to p. 40, line 17.]

10. Lookabaugh Co. corresponds with Smith & Wesson at least weekly and sometimes several times a week [Austin Dep. p. 22, lines 4-13.]

11. Lookabaugh investigates prospective dealers and communicates its findings and recommendations to Smith & Wesson and Smith & Wesson has acted in reliance upon such findings and recommendations. [Austin Dep. p. 48, line 15, to p. 22, line 3.]

After reviewing the record in this case, the Supreme Court of the State of California concluded as follows:

> "From the record it indisputably appears that Smith & Wesson had a continuing arrangement for the distribution and sale of its products throughout this state. Said defendant had retained a manufacturer's representative, Lookabaugh, for the promotion of sales for the servicing of dealer accounts, and for the distribution of advertising material which defendant furnished in furtherance of its selling activity. Such a regular course of business dealings in sales promotion within the state is similar to the regular purchasing activities of the foreign corporation in the Jahn case and the regular selling activities of the foreign corporation in the Borgward case. Though self-employed as a manufacturer's representative, Lookabaugh was performing much the same type of substantial selling services for Smith & Wesson through a course of regularly established and systematic business activity as were deemed in Gray v. Montgomery Ward, Inc. 155 Cal. App. 2d 55, to constitute 'doing business' in the state by the foreign corporation there involved. These services may reasonably be said to have given Smith & Wesson 'in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operat-

ing through its own office or paid sales force.' (Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 136.) Certainly, the admitted activities of Smith & Wesson in this state are more significant than the minimal contacts deemed sufficient in McGee v. International Life Insurance Company, 355 U. S. 220, where the foreign corporation elected to deal with its insured, a California resident, only by mail." (Pet. App. p. 5a.)

Applying the test derived from an analysis of the *International Shoe*, *McGee* and *Hanson* cases, it seems beyond question that Smith & Wesson has, through its combination commission salesman—advertising man—trouble shooter Lookabaugh, and through its extensive mail order business, "purposefully" sought the privilege of conducting activities within California and obtaining the benefit and protection of its laws. Secondly, the cause of action which is the subject of this suit arose directly out of the explosion of a gun sold through the "continuing arrangement for the distribution and sale of its products in California" developed and maintained by Smith & Wesson. In fact the record indicates that Lookabaugh was assigned by Smith & Wesson to the task of investigating this very incident and made reports to Smith & Wesson concerning it. [Giegerich Dep. Exs. 22, 24 and 25.]

Thirdly, it is necessary to weigh and consider the inconvenience to plaintiff of a refusal to entertain the action, the benefits which defendant has derived from its activities within California, and the other basic equities of this particular factual situation. Judge Learned Hand, who first enunciated this "estimate of inconveniences" test, expressly approved by this Court in the *International*

Shoe Co. case (at p. 317), later stated that it was "indistinguishable from the issue of 'forum non conveniens.'"

Kilpatrick v. Texas & P. Ry. Co., 166 F. 2d 788, 791 (1948).

In this regard, the California Supreme Court stated as follows:

> "It further appears that the gun which exploded was sold in this state, the accident occurred in this state, the plaintiff is a resident of this state, and many of the witnesses who will probably be called at the trial are present in this state. Therefore, in view of all the facts, we deem it not inconsistent with 'traditional notions of fair play and substantial justice' to subject the defendant Smith & Wesson to the jurisdiction of the courts of this state in this action." (Pet. App. p. 5a.)

At this point, several observations regarding defendant's Petition for Writ of Certiorari appear inescapable: (1) It wholly omits mention of the substantial contracts appearing in the record. (2) It mis-states the decision of the California Supreme Court by claiming that it eliminates the necessity for the existence of "substantial contacts." (3) It incorrectly equates the facts of this case with those of *Hanson v. Denckla, supra, Erlinger Mills v. Cohoes Fibre Mills*, 239 F. 2d 502, and *Mueller v. Steelcase, Inc.*, 172 Fed. Supp. 416.

As has been pointed out, in the *Hanson* case the only contacts were income payments and other correspondence by mail from the foreign trustee to the resident settlor. The Court stated:

> "The cause of action in this case is not one that arises out of an act done or transaction consum-

> mated in the forum state. In that respect, it differs from *McGee v. International Life Insurance Co.* . . . and the cases there cited . . . . (T)he record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in McGee."

In the *Erlinger* case, decided before McGee, the only contacts consisted of a single F. O. B. shipment of goods into the forum and a visit by the foreign corporation's manager in an attempt to arrange a settlement of the controversy. In the *Mueller* case, a non-resident salesman sold furniture F. O. B. to retailers in the forum, but, unlike the case at bar, did not maintain an office in the forum, did no adjusting of complaints or "trouble shooting," carried no advertising matter, arranged no publicity and investigated and reported on no dealers or prospective dealers for the foreign corporation. Moreover, the state statute struck down in that case was so broad as to eliminate the necessity for the existence of "substantial contacts." In short, the cases cited by petitioner are easily distinguishable from the case at bar.

B. Proper Service Upon Smith & Wesson, Inc., Was Effected by Service Upon Walter K. Lookabaugh.

The record indicates that the complaint and summons in this case were served upon "Walter K. Lookabaugh, as agent of the Smith & Wesson Arms Co., Salesmanager of the Smith & Wesson Arms Co. for the eleven western states, including California, and Manufacturer's Representative for Smith & Wesson Arms Co. in California."

Section 6500 of the California Corporations Code specifies that service upon a foreign corporation may be made by serving its "general manager in the State." However,

a long line of California cases, beginning with *Roehl v. Texas Company*, 107 Cal. App. 691, 291 Pac. 255, decided in 1930, has declared that once the existance of substantial contacts has been established, the real test of the validity of the service made is whether the agent served is of sufficient character, rank and dignity to make it reasonably certain that the defendant will be apprised of the service. (See, Opinion of the Supreme Court, Pet. App. p. 6a.)

The stand taken by the California courts is fully in accord with the rule announced by this Court in the *International Shoe Co.* case. There, service upon a salesman whose activities on behalf of the foreign corporation were far more restricted in scope than those of Lookabaugh, was held sufficient. Mr. Chief Justice Stone stated the position of the Court as follows (at p. 320):

> "We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. *It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.* (Citing cases.) (Emphasis added.)

After reviewing "plaintiff's extended showing of Smith & Wesson's activities in this state through its agreement with Lookabaugh for servicing dealer accounts, investigating and recommending prospective dealers to Smith & Wesson, arranging publicity, distributing advertising, and

handling and reporting on complaints concerning defects in Smith & Wesson products" (Opinion of the Supreme Court, Pet. App. p. 3a), the California Supreme Court concluded as follows (at p. 6a):

> "Here, it reasonably appears that Lookabaugh, as a manufacturer's representative actively engaged in promoting the sales of Smith & Wesson and earning commission through such sales, would have ample regular contact with Smith & Wesson and would be of 'sufficient character and rank to make it reasonably certain' that Smith & Wesson would be apprised of the service of process. Neither the fact that Lookabaugh's organization was designated as 'manufacturer's representatives' nor the fact that such representatives promoted sales 'on their own time and expense' is determinative here. Whether Smith & Wesson was operating 'through an independent contract, agent, employee or in any other manner,' the essential factor is that Lookabaugh in his selling and advertising activities was performing services for Smith & Wesson and providing it with the opportunity for 'regular contact with its customers and a channel for the continuous flow of business into the State.' (citing cases). In short, the arrangement of Smith & Wesson with Lookabaugh appears, in the light of the president's affidavit, to have given Smith & Wesson substantially the business advantages that it would have enjoyed 'if it conducted its business through its own offices or paid agents in the state' (citing cases), and such arrangement was sufficient to constitute Lookabaugh 'the general manager in this State' for purposes of service of process on Smith & Wesson." (Corp. Code, Sec. 6500.)

Again, the Petition filed by defendant grossly misstates the facts. The Petition claims (at p. 16):

> "It is also established that Walter K. Lookabaugh is not an agent, servant or employee of any kind or nature of Smith & Wesson, Inc., and the most that can be said of him is that he is an agent or employee of Walter K. Lookabaugh Company, a corporation. . . ."

In the first place, the Walter K. Lookabaugh Co. is not a corporation, and, secondly, Walter K. Lookabaugh *is* the Walter K. Lookabaugh Co. These matters are covered by the following excerpts from the Lookbaugh deposition:

> "Q. By Mr. Chain: Mr. Lookabaugh, are you doing business at the present time under the firm style and trade name of Walter K. Lookabaugh. A. Yes, sir." (P. 17, lines 12-15) . . .
>
> "Q. And Mr. Lookabaugh, ever since November, 1955, you have been in your own name operating that business which was formerly operated by your father, isn't that right; you are the only owner of that, are you not? A. Yes, sir." (P. 19, lines 6-10) . . .
>
> "Q. And the Walter K. Lookabaugh Company is you? A. Yes, sir." (P. 23, lines 13-14.)

Additionally, the discussion in the Petition of the dangers of serving office boys or janitors (Pet. p. 16) is not pertinent. Service in this case was made upon the exclusive sales representative and "trouble shooter" of Smith & Wesson in the eleven western states. The Opinion of the California Supreme Court details the extensive activities of Lookabaugh in Smith & Wesson's behalf and

the regular correspondence between them. Certainly, Lookabaugh would forward, and he obviously has forwarded, copies of any process delivered to him.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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